rule and the rule laid down by most writers on private international law.[25] Some Continental countries have applied the law of the jurisdiction of the offending ship, in cases of collision at sea.[26]

The case of *The Middlesex* presents an additional fact to those in *La Bourgogne*, namely, that the deceased was aboard the innocent vessel, and that the two vessels were from different jurisdictions. The court in deciding that case apparently relied on a *dictum* by Mr. Justice Bradley in *The Scotland*,[27] to the effect that if a collision between two vessels of different nationality was being adjudicated in a court of a third jurisdiction, the court would apply the law of the *forum* since it would not be fair to choose between the laws of the jurisdictions of the vessels. It is to be noted that this *dictum* was not overruled by the decision in *La Bourgogne*, since the fact that the deceased was on board the offending ship made it unimportant what the ship collided with. It is submitted, however, that the decision in *The Middlesex*, that the owners of the offending vessel are not liable for these deaths, is not sound. As has been pointed out, the law governing torts is the law of the place where the injury occurred. And that place, in the principal case, was the ship on which the deceased was riding.[28] Or it might be proper for the court to apply the law of the jurisdiction of the offending vessel on the ground that it could not complain if held liable under its own law.[29] The death statutes in either state, in the principal case, although differing as to the measure of damages, would have allowed recovery.[30] Even applying Mr. Justice Bradley's *dictum*, the same result would follow. The suit was brought in a federal court. Hence the law of the *forum*, in the absence of legislation by Congress, must be the state law,[31] and the court is again driven to a choice between the laws of the two states. The necessity of such a choice should not justify denial of all recovery for this greatest of all injuries. It should be the policy of the courts to extend rather than restrict the operation of death statutes.

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RIGHT OF A PUBLIC UTILITY TO CEASE OPERATION AND DISMANTLE ITS PLANT WITHOUT CONSENT OF THE STATE. — At an early date our law recognized that where one devotes his property to a public service such property becomes affected with a public interest and ceases to be *juris*

[25] See MINOR, CONFLICT OF LAWS, § 194; BAR, INTERNATIONAL LAW (Gillespie's Trans.), 360, note 2.

[26] That is the rule in France: 19 Clunet, 153 (Cass., 4 November, 1891). And in Germany: 14 Steuffert, 335 (Sup. Ct. of Berlin, 25 October, 1859).

Bar lays down the rule that recovery in case of collision at sea is limited by the laws of the jurisdictions of both the claimant and the offending vessel. BAR, 489–90.

[27] 105 U. S. 24, 29 (1881).

[28] United States *v.* Davis, 2 Sumner (Circ. Ct.) 482 (1807).

[29] In Whipple *v.* Thayer, 16 Pick. (Mass.) 25 (1834), it was held that where the estate of an insolvent was being administered, the right of a creditor from another state could be limited by the law of his state whether or not there was such a limitation in the law of the *forum*.

[30] MAINE REV. STAT., 1903, c. 89, §§ 9, 10; MASS. ACTS OF 1907, c. 375. The offending vessel was domiciled in Massachusetts.

[31] Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92 (1901). See 1 BEALE, CONFLICT OF LAWS, Part I, § 112 *a*.

*privati* only.[1] One may enter upon such service voluntarily without preparing the public for his advent,[2] but, because he has by his representations led the public to rely upon the service, he may not withdraw from performing the service without reasonable notice to the public.[3] What constitutes reasonable notice is a question of fact in each case depending upon the character and importance of the business.[4]

The case of *People ex rel. Hubbard* v. *Colorado Title & Trust Co.*,[5] recently decided by the Colorado Supreme Court, raises the question whether one who is engaged in public service must, in attempting to withdraw therefrom and dismantle his plant, not only give reasonable notice to that effect but in addition obtain the consent of the state. In that case a court of equity upon foreclosure proceedings, without the consent of the Public Utilities Commission, ordered the receiver of the Colorado Midland Railroad Company to discontinue service and dismantle the railroad.[6] The Supreme Court of Colorado held this order void on the ground that under the Public Utilities Act which conferred upon the commission power to regulate service, the commission had exclusive jurisdiction to determine whether or not a railroad company may cease operation and dismantle its plant.

The problem whether a public utility may discontinue service and dismantle its plant only with consent of the state must be considered from two different viewpoints: that of the chartered corporation, and that of the unincorporated proprietor. As to the former, there are three types of charters: first, those clearly mandatory; second, those which are in general terms only, being neither clearly mandatory nor clearly permissive; and third, those clearly permissive.

The case of the mandatory charter raises no difficulty. So long as the corporation retains its charter it is bound by the terms thereof and may be compelled to continue operation.[7] The only limitation upon the

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[1] Munn *v.* Illinois, 94 U. S. 113 (1876); New York Stock Exchange *v.* Board of Trade, 127 Ill. 153, 19 N. E. 855 (1889); 1 HARG. LAW TRACTS, 78; 32 HARV. L. REV. 169.

[2] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 316, 330. However, according to 1 HARG. LAW TRACTS, 6, it appears that because of the King's ancient right of prerogative over rivers and arms of the sea "no man may set up a common ferry for all passengers without a prescription time out of mind, or a charter from the King."

[3] 1 WYMAN, § 316, and cases cited.

[4] "A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for other opportunities for shippers over the canal are numerous. But a railroad company may not without a long notice abandon its line. And a gas company could abandon its service only after a long enough period to provide a new supply." 1 WYMAN, § 317, and see cases there cited.

For decisions by public service commissions on the point, see *Re* Tidewater & W. R. Co., P. U. R. 1917 E, 798 (Va. State Corp. Com.); *Re* Delaware & H. Co., P. U. R. 1917 A, 715 (N. Y. Pub. Serv. Com., 2d Dist.); *Ex parte* Central Illinois Public Service Co., P. U. R. 1916 B, 920 (Ill. Pub. Util. Com.).

[5] 178 Pac. 6 (Colo.) (1918).

[6] Since the railroad company appeared and consented to this order no question was raised as to the power of the court to direct that the receiver exercise more than his customary function of preserving the assets from waste and destruction. See Equitable Trust Co. *v.* Great Shoshone Co., 158 C. C. A. 99, 105, 245 Fed. 697, 703 (1917); Kokernot *v.* Roos, 189 S. W. 505, 508 (Tex. Civ. App.) (1916); HIGH, RECEIVERS, 4 ed., § 5.

[7] Southern Railway Co. *v.* Hatchett, 174 Ky. 463, 192 S. W. 694 (1917); State *ex rel.*

state in regard to a corporation with a mandatory charter is that it cannot compel operation at a loss, thereby depriving the corporation of its property for public use without compensation.[8]

The charter of incorporation which is in general terms, being neither clearly mandatory nor clearly permissive, is perhaps the commonest type. Following the well-established rule of construction that a charter from the state is construed most strongly against the grantee,[9] courts, where public necessity is involved, tend to hold such charters mandatory, thereby preventing withdrawal from service except with consent of the state.[10]

The case of the clearly permissive charter seldom arises. The decision in the Dartmouth College case [11] has led to the custom of reserving a power to the legislature to alter charters of incorporation at will,[12] such power being reserved by constitutional provision,[13] by general

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Caster *v.* Postal Telegraph Co., 96 Kan. 298, 150 Pac. 544 (1915); Rowland *v.* Saline River Railway Co., 119 Ark. 239, 177 S. W. 896 (1915); Brownell *v.* Old Colony Railroad, 164 Mass. 29, 41 N. E. 107 (1895); Savannah & Ogeechee Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937 (1893). See Columbus R. Power & Light Co. *v.* Columbus, 253 Fed. 499, 505 (1918); 26 HARV. L. REV. 659.

[8] "The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation." Chicago, M. & St. P. Railroad Co. *v.* Wisconsin, 238 U. S. 491, 501 (1915). State *ex rel.* Caster *v.* Postal Telegraph Co., *supra*, note 7; Rowland *v.* Saline River Railway Co., *supra*, note 7.

[9] Cleveland Electric Railway Co. *v.* Cleveland, 204 U. S. 116 (1907). 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., §§ 554–57.

[10] Under a franchise giving "the right, power, and authority" to construct, maintain and operate a line of electric railway, the court held that the railway could not, against the will of the state, abandon the enterprise if to do so would work a prejudice to the public interest. Day *v.* Tacoma Railway & Power Co., 80 Wash. 161, 141 Pac. 347 (1914). Colorado & S. Railway Co. *v.* State R. Commission, 54 Colo. 64, 129 Pac. 506 (1912); Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343 (1875). 26 HARV. L. REV. 659.

But the courts construe general charters to be mandatory only "to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains this is sufficient evidence that the public do not require it to be kept in operation; and in such case the company may cease operating the road unless this be contrary to the express terms of its charter." MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 1119. Central Bank & Trust Corporation *v.* Cleveland, 252 Fed. 530 (1918); State *ex rel. v.* Dodge City, M. & T. R. Co., 53 Kan. 329, 36 Pac. 755 (1894); State *v.* Old Colony Trust Co., 131 C. C. A. 581, 215 Fed. 307 (1914); Moore *v.* Lewisburg & R. E. R. Co., 80 W. Va. 653, 93 S. E. 762 (1917).

That a public service corporation cannot be compelled to do the impossible is strikingly brought out in Public Service Commission *v.* International Ry. Co., 224 N. Y. 631, 120 N. E. 727 (1918). Street railway employees were on a strike demanding a retroactive scale of wages which the company could not pay through lack of funds. The court held it error to require the railway to operate cars within two days because to do so would compel the company to take back the striking employees.

In Middlesex R. R. Co. *v.* Boston & Chelsea R. R. Co., 115 Mass. 347 (1874), the court held it *ultra vires* for a horse-railroad corporation to disable itself by selling in the absence of legislative authority.

[11] 4 Wheat. (U. S.) 518 (1819).

[12] See Albany N. R. R. Co. *v.* Brownell, 24 N. Y. 345, 351 (1862); Supreme Council C. K. A. *v.* Fenwick, 169 Ky. 269, 277, 183 S. W. 906, 909 (1916).

[13] Ramapo Water Co. *v.* New York, 236 U. S. 579 (1915); Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778 (1892).

statute,[14] or by provision in the charter itself.[15] Where, however, charters have been held permissive, the courts have generally agreed that the incorporators cannot against their will be compelled to continue the operation of the plant.[16]

The case of the unincorporated proprietor is distinct from that of the chartered corporation. The chartered corporation has a legal existence only as a public servant and as such can be subjected to more rigid requirements than the unincorporated proprietor who has an existence separate and distinct from his existence as a public servant. Accordingly the cases consistently hold that an individual cannot be compelled to continue the operation of a public service against his will.[17] To hold otherwise would endanger his rights under the Thirteenth and Fourteenth Amendments.[18]

The law on this point has been thrown into confusion because the cases have failed to distinguish between cessation of operation on the one hand and dismantling of the plant on the other.[19] The latter works a much greater hardship on the public than the former. As the Maine Public Utilities Commission recently pointed out,[20] "The public is entitled to assurance that the present company shall not be permitted to stand in the way if interested parties wish to render such service." In other words, where a real public necessity for this or a similar service continues, a public utility should not be allowed to scrap its plant until a reasonable time has elapsed within which (1) a purchaser willing to render the same service may be found,[21] or (2) the parties being served by the utility may decide to guarantee it against further loss,[22] or (3) a

[14] Polk *v.* Mutual Reserve Fund Life Association, 207 U. S. 310 (1907); People *ex rel.* *v.* Rose, 207 Ill. 352, 69 N. E. 762 (1904).

[15] Supreme Council C. K. A. *v.* Logsdon, 183 Ind. 183, 108 N. E. 587 (1915); Ashuelot R. Co. *v.* Elliot, 58 N. H. 451 (1878).

[16] East Ohio Gas Co. *v.* Akron, 81 Ohio St. 33, 90 N. E. 40 (1909); State *ex rel.* Knight *v.* Helena Power & Light Co., 22 Mont. 391, 56 Pac. 685 (1899); San Antonio Street Railway Co. *v.* State, 90 Texas, 520, 39 S. W. 926 (1897). See BOOTH, STREET RAILWAYS, 2 ed., § 65.

[17] In the early case of Rex *v.* Collins, Palmer, 373 (1623), the court said that "an innkeeper may at his pleasure demolish his sign and leave off innkeeping." Similarly as to a ferryman, Carter *v.* The Commonwealth, 2 Va. Cas. 354 (1823), and as to teamster, Satterlee *v.* Groat, 1 Wend. (N. Y.) 272 (1828). Since the bulk of public service work is to-day carried on by corporations recent cases as to the right of an unincorporated public service proprietor to withdraw from business at will are scarce. But see San Antonio Street Railway Co. *v.* State, 90 Texas, 520, 528, 39 S. W. 926, 930 (1897) where the court says, "Certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so." See also State *ex rel.* Knight *v.* Helena Power & Light Co., 22 Mont. 391, 397, 56 Pac. 685, 687 (1899).

[18] As to Thirteenth Amendment, see United States *v.* Reynolds, 235 U. S. 133 (1914), *Ex parte* Hollman, 79 S. C. 9, 60 S. E. 19 (1908). As to the Fourteenth Amendment, see Van Denman & Lewis Co. *v.* Rast, 214 Fed. 827 (1913); Allgeyer *v.* Louisiana, 165 U. S. 578, 589 (1897).

[19] The proper distinction was, however, made in Rowland *v.* Saline River Railway Co., 119 Ark. 239, 246, 177 S. W. 896, 899 (1915) where the court said, "It does not follow that, because we have held that the order of the railroad commission was arbitrary and oppressive, the railroad company has a right to take up its rails and dispose of them of its own motion."

[20] *Re* St. Croix Gaslight Co., P. U. R. 1919 A, 487, 493 (Maine Pub. Util. Com.).

[21] *Re* St. Croix Gaslight Co., *supra*, note 20.

[22] See Central Bank & Trust Corporation *v.* Cleveland, 252 Fed. 530, 534 (1918).

substitute service may be provided,[23] or (4) the state may exercise its option to take the property by eminent domain in behalf of either state or private ownership and operation.[24]

The principal case raises the further question whether a public utilities commission has jurisdiction over the cessation of service by and dismantling of a public utility. It is settled that the inherent power of the state to regulate the service of a public utility enterprise may be delegated to a commission or other administrative body.[25] The Colorado Public Utilities Act, which is typical of the public utilities acts of other states, simply confers upon the commission power to regulate service,[26] but the court expressly says, and it seems correctly, that the power to regulate, necessarily includes the power to prevent a railway, where there is a public necessity, from discontinuing service and dismantling its plant.[27] It is true, great power is thereby conferred upon the commissions, but it must be remembered that their decisions are kept by the courts within constitutional bounds.[28]

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[23] 1 WYMAN, § 317.

[24] See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 445.

On the other hand, "a railroad track may be abandoned and its construction material removed when it is conclusively shown that the public no longer has any interest in such materials remaining on the roadbed." Enid, O. & W. Railway Co. *v.* State, 181 S. W. 498, 502 (Tex. Civ. App.) (1915).

[25] See Atlantic Coast Electric Railway Co. *v.* Board of Public Utility Commissioners, 104 Atl. 218 (N. J.) (1918); Trustees of Saratoga Springs *v.* Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693 (1908). 32 HARV. L. REV. 74.

[26] 1913 SESS. LAWS COLORADO, chap. 127, as amended by 1915 SESS. LAWS COLORADO, chap. 134, and by 1917 SESS. LAWS Colorado, chap. 110.

[27] People *ex rel.* Hubbard *v.* Colorado Title & Trust Co., *supra*, note 5, at page 9; State *ex rel.* Tate *v.* Brooks-Scanlon Co., 143 La. 539, 78 So. 847 (1918).

For commission decisions see *Re* Parkville Oil & Gas Co., P. U. R. 1919 A, 502 (Mo. Pub. Serv. Com.); City of Pana *v.* Central Illinois Public Service Co., P. U. R. 1916 B, 177 (Ill. Pub. Util. Com.).

It is submitted that in exercising this power the commission should not be too hasty in deciding that the utility in question cannot be operated except at a loss. The utility should be compelled to exhaust every reasonable effort to give the service required. The Indiana, New Jersey, and Colorado commissions have taken a proper step in refusing to allow discontinuance of service without a previous application to the commission to increase rates. *Re* Muncie Light Co., P. U. R. 1918 B, 194 (Ind. Pub. Serv. Com.); *Re* Seashore Gas Co., P. U. R. 1918 A, 871 (N. J. Board of Pub. Util. Comrs.); *Re* Denver, L. & N. R. Co., P. U. R. 1917 F, 744 (Colo. Pub. Util. Com.). See also City of Pana *v.* Central Illinois Public Service Co., P. U. R. 1916 B, 177, 179 (Ill. Pub. Util. Com.).

[28] State *ex rel.* Railroad Commissioners *v.* Florida East Coast Railway Co., 69 Fla. 165, 67 So. 906 (1915); Northern Pacific Railway Co. *v.* North Dakota, 236 U. S. 585 (1915); Atchison, Topeka, & S. Fe Railway Co. *v.* Railroad Commission, 173 Cal. 577, 160 Pac. 828 (1916). See St. Louis, I. M. & S. Railway Co. *v.* Bellamy, 113 Ark. 384, 169 S. W. 322 (1914).

The types of questions arising before the courts on review are illustrated in Salt Lake City *v.* Utah Light & Traction Co., 173 Pac. 556, 559 (Utah), (1918), where the court says: "The order of the commission increasing the fares as aforesaid presents three questions: (1) Did the passing of the franchise ordinances fixing the fares and their acceptance by the defendant constitute a contract . . . ? (2) If the franchise ordinances constituted contracts, was it within the power of the Legislature to authorize the commission to change the fares? (3) Does the constitutional provision by which the city authorities are given the exclusive right to permit or to refuse permission to street railway companies to construct and operate street cars within the cities of this state prevent the state, through its Legislature, from exercising its sovereign prerogative to regulate and change the fares fixed in the franchise ordinances?"